

COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

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January 29, 2014

Jordan Knudsen
Deputy County Attorney
Roosevelt County
PO Box 816
Wolf Point, MT 59201

COPP-2014-AO-002

Re: Public Official Acts

Dear Mr. Knudsen:

You contacted this Office on December 31, 2013 with the specific concern addressed below. You explained that the incumbent sheriff of Roosevelt County has, during the tenure of his Office, placed his name on county patrol cars. The sheriff is now running for reelection and you asked whether continued placement of his name on patrol cars constitutes a campaign activity such that it needs to be discontinued.

ADVISORY OPINION

It is the opinion of this Office that the Sheriff of Roosevelt County may continue listing his name on patrol cars during the time of his candidacy for reelection. The pertinent law and application of that law supporting this Opinion is discussed in that certain attorney general opinion of January 31, 2005 that accompanies this advisory opinion. Please review that Attorney General Opinion as to a general discussion of applicable law.

While the accompanying AG Opinion does not specifically address the use of a Sheriff's name on a patrol car it does say that: "[a] title or a uniform is

simply an accouterment of a public employee's or officer's position. A sheriff is not required to shed all associations, including his uniform, with his official position in order to exercise his protected right to express personal political beliefs." This Office has applied that reasoning to determine that an incumbent Public Service Commissioner is not prohibited from using a photographic image depicting him at work in his public office. See *Matter of Fasbender v. Toole*, Ethics Opinion, February 21, 2012 (the Honorable Thomas Honzel, Deputy Commissioner). A copy of the Fasbender Decision also accompanies this letter.

In making this opinion, the Commissioner recognizes that the patrol cars are public property. The Commissioner also recognizes that an elected Official, such as the Sheriff, is on "public time" at all times. See, AG opinion, January 31, 2005. The Sheriff determined, pre-election, that there was value to the public by declaring his responsibility, as a public officer, for the actions of law enforcement taken by officers under his supervision. Running for reelection does not turn that pre-election purpose into a campaign purpose. Law enforcement actions, and the clear statement of the name of the public official responsible for the proper conduct of the officers involved, will continue up to and through the election. Further, placement of a sheriff's name on a patrol car is not inconsistent with similar actions of another public official who may place his or her name on an office website or stationary.

LIMITATIONS ON ADVISORY OPINION

This letter is an advisory opinion based on the specific written facts and questions as presented above. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the matters discussed above.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Motl", is written over the printed name.

Jonathan R. Motl

Commissioner of Political Practices

VOLUME NO. 51

OPINION NO. 1

PUBLIC EMPLOYEES - Right to exercise political speech;
PUBLIC OFFICERS - Right to exercise political speech;
STATUTORY CONSTRUCTION - Construing plain meaning of words of statute;
MONTANA CODE ANNOTATED - Section 2-2-121, (3), (a), (b), (c).

HELD: A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.

January 31, 2005

Mr. Mathew J. Johnson
Jefferson County Attorney
P.O. Box H
Boulder, MT 59632

Dear Mr. Johnson:

You have requested my opinion on a number of questions concerning public officers and political speech. I have rephrased your questions as follows:

Does Mont. Code Ann. § 2-2-121 limit a public officer's or employee's right to support or oppose a political candidate or passage of a ballot issue?

Mont. Code Ann. § 2-2-121 sets forth the rules of conduct for public officers and employees. Subsection (3) includes a prohibition against the use of public time and resources for political speech, as well as a provision protecting a public officer or employee's freedom to express personal political beliefs. It provides:

(3)(a) A public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office. With respect to ballot issues, properly incidental activities are restricted to the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations.

(c) This subsection (3) is not intended to restrict the right of a public officer or public employee to express personal political beliefs.

(Emphasis added.)

It is not personal political speech that is prohibited by subsection (3)(a); rather, it is the use of public time or resources in the presentation or furtherance of political speech. While a public officer or employee is not required to shed his public persona in order to exercise his right to free speech, he may not use public resources when expressing personal political beliefs.

Your questions pose scenarios involving elected officers, like county commissioners and sheriffs, whose unique positions require them to work a schedule outside of the typical 8 to 5 schedule of most public employees. You ask, for instance, what of the county commissioner who receives phone calls at home in the evenings, or the sheriff who is on call 24 hours a day?

In Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 605-606 (1967), the Supreme Court stated, "a government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment." Likewise, a county commissioner or sheriff (or any other public employees or officers) does not relinquish her First Amendment rights by the mere fact that she may be a public official. Pursuant to the plain language of Mont. Code Ann. § 2-2-121(3)(a), so long as a public officer or employee is not using "public time, facilities, equipment, supplies, personnel, or funds" she may engage in political speech. See Dahl v. Uninsured Employers' Fund, 1999 MT 168, ¶ 16, 295 Mont. 173, 983 P.2d 363.

Although "public time" is not defined, a reasonable construction would be those hours for which an employee receives payment from a public employer. Elected officials, of

Mr. Mathew J. Johnson
January 31, 2005
Page 3

course, do not have specific hours of employment nor do they receive vacation leave or other time off duty. They receive annual salaries rather than hourly wages. Thus, they could be considered to be on "public time" at all times. However, as long as public facilities, equipment, supplies, or funds are not involved, elected officials are not restricted in the exercise of political speech by the provisions of Montana law.

You also ask if subsection (3) prohibits a public employee or officer from signing a letter to the editor with his official title or prevents a law enforcement officer from wearing a uniform to campaign for a political issue or candidate. I conclude that, for the reasons stated above, subsection (3)(c) allows a public official to sign a letter to the editor, expressing personal political beliefs, with his official title, so long as public resources were not used to create the letter. Moreover, a sheriff would not be prohibited from wearing a uniform while campaigning for a political issue or candidate. In my opinion, neither activity would be prohibited by subsection (3).

Again, subsection (3)(a) only prevents use of "public time, facilities, equipment, supplies, personnel, or funds" in the furtherance of personal political speech. A title or a uniform is simply an accouterment of a public employee's or officer's position. A sheriff is not required to shed all associations, including his uniform, with his official position in order to exercise his protected right to express personal political beliefs.

The presumption is that free speech rights are protected and only the very specific restrictions in Mont. Code Ann. § 2-2-121 can be invoked to limit a public officer's or public employee's right to political speech.

THEREFORE, IT IS MY OPINION:

A public officer or public employee may engage in political speech so long as his or her speech does not involve the use of public time, facilities, equipment, supplies, personnel, or funds.

Very truly yours,

MIKE McGRATH
Attorney General

mm/anb/jym

**BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES
STATE OF MONTANA**

IN THE MATTER OF THE ETHICS)	
COMPLAINT OF MICHAEL FASBENDER)	FINAL ORDER
AGAINST KEN TOOLE)	and
)	DECISION
)	

Complainant Michael Fasbender (Fasbender) has filed an ethics complaint against Respondent Ken Toole (Toole), alleging that Toole violated Section 2-2-121(3)(a), MCA. The facts are not in dispute and the case has been submitted on briefs. Having fully considered the matter, I conclude that Toole did not violate the statute.

BACKGROUND

On August 20, 2010, Fasbender filed his complaint against Toole who was running for reelection to the Montana Public Service Commission (PSC). By letter dated September 16, 2010, Dennis Unsworth, who was the Commissioner of Political Practices, notified both Fasbender and Toole that the complaint appeared to meet the requirements of 44.10.604 and 44.10.607, ARM, and that an informal contested case proceeding would be initiated in conformance with 44.10.607, ARM. Nothing further was done until August 23, 2011, when David B. Gallik, who then was the Commissioner of Political Practices, appointed me Deputy Commissioner/Hearing Examiner for this case because he had a conflict of interest. At the scheduling conference held

November 29, 2011, the parties agreed that the facts are not in dispute and that the matter could be submitted on briefs.

Throughout the proceedings, each party has represented himself.

FACTS

In 2010, Toole was the duly elected Commissioner for PSC District Number Five. He was also the Commission's Vice-Chairman. On February 6, 2010, Toole sent out a press release announcing that he was filing for reelection.

Toole used the PSC conference room to take photographs for use in his reelection campaign. One of the photographs was used in Toole's campaign brochure. The photograph depicts Toole sitting at the chair he used while the Commission was meeting. The photograph includes a portion of the Commissioners' table, Toole's nameplate with the vice-chair designation, and a gavel.

The photograph was taken during the hours the PSC is normally open, but the Commission was not meeting at the time. As an elected official Toole was not required to keep track of his hours and he did not receive accrued vacation time or comp-time. No public employee time and no public equipment or supplies were used in taking the photograph. Toole paid for the brochure and the photographer with campaign funds.

DISCUSSION

The issue is whether Toole's use of the PSC conference room to take a photograph which he included in his campaign brochure

violated Section 2-2-121(3)(a), MCA. That section states:

(3) (a) Except as provided in subsection (3)(b), a public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

(i) authorized by law; or
(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

(b) As used in this subsection (3), "properly incidental to another activity required or authorized by law" does not include any activities related to solicitation of support for or opposition to the nomination or election of a person to public office or political committees organized to support or oppose a candidate or candidates for public office.

In 2010 Toole was a public officer. The PSC conference room is a public facility. Campaign brochures are produced and used to garner support for a candidate's election. That, however, does not necessarily lead to the conclusion that the inclusion of a photograph, such as the one here, in an incumbent's campaign brochure automatically constitutes a violation of Section 2-2-121(3)(a), MCA.

The purpose of the Code of Ethics is set out in Section 2-2-101, MCA.

The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The provisions of this part recognize that some actions are

conflicts per se between public and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances.

An elected officer who is running for reelection or an elected public officer who is running for another elected office can and is expected to run on his/her record. As Toole points out, it is common in Montana for elected officers who are seeking reelection or running for a different office to use photographs of themselves in or in front of a public building such as the state Capitol or a county courthouse. He has attached to his brief several examples of this campaign practice.

The examples submitted by Toole all involve legislators. Fasbender contends that those campaign materials are not relevant because legislators are not subject to Section 2-2-121(3)(a), MCA. Section 2-2-111, MCA, the section on rules of conduct for legislators, does not contain the proscription contained in Section 2-2-121(3)(a), MCA. However, while legislators are not included in Section 2-2-121(3)(a), MCA, public employees are. There are legislators who are also public employees and thus would be subject to the statute.

Just like any other candidate, a public employee who is running for an elective office can emphasize those things in his/her background and experiences that qualify him or her for the position sought. One of the examples submitted by Toole is

from the campaign materials of a current state senator who is running for attorney general. Included in those materials is a photograph of him on the Senate floor. There certainly is nothing wrong with that. However, another candidate is an assistant attorney general. Under the position advocated by Fasbender, she would be precluded from using a photograph of herself in the Attorney General's office, the State Justice Building, or a courtroom.

At the local level, it probably would not be uncommon for a clerk in a county treasurer's office to run for that office if the incumbent decided not to run. She, however, could not use a photograph of herself in the courthouse, but her opponent could. Similarly, an attorney running against an incumbent county attorney could use a photograph of himself in the courtroom, but the incumbent could not.

As these examples illustrate, a photograph of a public officer or public employee taken in a public building where the officer or employee works would not equate to using a public facility to solicit support for the person's election to a public office. The photograph would be no different than a legislator using a picture of him or herself in the Capitol or a legislative chamber in his/her campaign materials.

While the photograph Toole used pointed out that he was the incumbent and the Commission's vice-chairman, those were facts

and he was entitled to run on them. Moreover, there is nothing to show that Toole was in any way running his campaign out of his PSC office.

For these reasons, I conclude that Toole did not violate Section 2-2-121(3)(a), MCA, and that Fasbender's complaint should be dismissed.


COSTS

Section 2-2-136(2), MCA, provides that "the commissioner may assess costs of the proceeding against the person bringing the charges if the commissioner determines that a violation did not occur." During these proceedings, Toole has represented himself, and it appears that if he incurred any costs they would be minimal. Therefore, costs will not be assessed against Fasbender.

ORDER

IT IS ORDERED that the complaint filed by Michael Fasbender against Ken Toole is **DISMISSED**.

DATED this 21st day of February, 2012.


THOMAS C. HONZEL

Deputy Commissioner of Political Practices

NOTICE: This is a final decision in a contested case. The parties have the right to seek judicial review of this decision pursuant to the provisions of Sections 2-4-701 through 2-4-711, MCA.

c: Michael Fasbender
Ken Toole

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES
STATE OF MONTANA

In the Matter of the Complaint of)	FINDINGS OF FACT
L. David Frasier Against)	AND
Barb Charlton and Mark Simonich)	CONCLUSIONS OF LAW

I. BACKGROUND

On December 3, 2004, Mr. L. David Frasier (Frasier) filed a complaint alleging that Ms. Barb Charlton and Mr. Mark Simonich (Charlton and Simonich) violated Montana Code Annotated §§ 2-2-103 and 2-2-104 of the Montana Code of Ethics (Montana Code Annotated §§ 2-2-101, *et seq.*).¹ The Code prescribes ethical standards for public sector employees. In this matter, the terms "public employee" and "state officer" defined in Montana Code Annotated § 2-2-102(7) and (11), respectively, include Charlton and Simonich.

Pursuant to Montana Code Annotated § 2-2-136, an informal contested case hearing was held on March 31, 2005, to consider evidence and testimony regarding the alleged violations of Montana Code Annotated §§ 2-2-103 and 2-2-104. Frasier appeared without counsel in this matter and he was advised at all times that he had the burden of proving that Charlton and Simonich had violated the Code of Ethics. Frasier called only himself to testify during his case-in-chief. Following Frasier's testimony and cross-examination by counsel for Charlton and Simonich, Charlton's and Simonich's motion for entry of judgment was granted.

II. FINDINGS OF FACT

1. Charlton and Simonich, as the Management Services Division Administrator and former Director of the Department of Commerce, respectively, are public

¹ Frasier's Pre-Hearing Order added an allegation to the original complaint by stating that Charlton and Simonich violated Montana Code Annotated § 2-2-104(1)(b). In Frasier's initial complaint, he alleged only that Charlton and Simonich misused state resources for personal or private business gain.

employees or state officers subject to the provisions of Montana Code Annotated §§ 2-2-103 and 2-2-104.²

2. The second sentence of Montana Code Annotated § 2-2-103(1), states that "[a] public officer, legislator, or public employee shall carry out the individual's duties for the benefit of the people of the state."
3. Montana Code Annotated § 2-2-104(1) provides:

Rules of conduct for public officers, legislators, and public

employees. (1) Proof of commission of any act enumerated in this section is proof that the actor has breached the actor's public duty. A public officer, legislator, or public employee may not:

(a) disclose or use confidential information acquired in the course of official duties in order to further substantially the individual's personal economic interests; or

(b) accept a gift of substantial value or a substantial economic benefit tantamount to a gift:

(i) that would tend improperly to influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or

(ii) that the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken.

4. Charlton and Simonich brought personal computers to their workplace where a Department of Commerce employee performed various updating and troubleshooting activities.³
5. Frasier used his state computer for personal matters during work hours while employed by the Department of Commerce. Frasier used his state computer during work hours to purchase books from "Amazon.com," to purchase a vehicle on "ebay," to discuss possible auto loan financing, to discuss the possible purchase of a bike, and to purchase golf clubs.
6. Frasier does not believe that his use of his state computer during work hours for personal matters violates the Montana Code of Ethics.
7. The State of Montana's official policy concerning the use of state computers for personal use expressly allows such personal use under limited and defined

² Mark Simonich was the Director of the Department of Commerce at the time the complaint was filed. Following the 2004 general election, Simonich took employment with a different state government agency.

³ Respondent's Proposed Pre-Hearing Order.

circumstances. The State of Montana Employee Handbook, April 2005 , Electronic Mail Policy, No. ENT-NET-042, November 2002, and the Internet Acceptable Use Policy, No. ENT-INT-011, August 2001, all contain a provision stating “[t]he State provided Internet, intranet and related services are not to be used for: 1) “for-profit” activities, 2) “non-profit” or public, professional or service organization activities that aren’t related to an employee’s job duties, or 3) *for extensive use for private, recreational, or personal activities*” (emphasis added).

7. “Extensive use for private, recreational, or personal activities” is not defined in the Montana Code Annotated, Administrative Rules of Montana, the Montana Operating Manual, the State Employee Handbook, or the Information Technology Enterprise policies.

III. DISCUSSION

Montana Code Annotated §2-2-103

Montana Code Annotated §2-2-103(1) contains the legislature’s broad public policy statement that public servants have a duty to perform their day-to-day activities for the benefit of the public and that engaging in certain prohibited activities results in a violation of the public trust. Montana Code Annotated § 2-2-104 and other sections of the Code then establish specific rules of conduct for legislators, state employees, public officials, and employees of local governments. The specific rules of conduct in the Code reflect the legislature’s decision to urge the avoidance of conflicts of interest or the performance of an official act (issuing a permit or approving a contract or program) that would allow a public official or public employee to benefit personally. The prohibitions in the Code of Ethics are primarily designed to prevent a public employee or public official from receiving a personal financial benefit as a result of being in a position of authority, engaging in activity that would cause economic or personal harm to others as a result of some official action while benefiting the public official or employee, or using public resources for political purposes or for personal business purposes.

Frasier asserts that 2-2-103(1) must be literally applied as a rule of conduct to all public employees and officials. The practical and legal effect of Frasier’s assertion is that every act by a public employee or a public official while on the job or at the place of public employment must benefit the people of the state. Any act of a personal nature

would be a violation of 2-2-103(1). Such a sweeping interpretation and application of Montana Code Annotated §2-2-103(1) cannot be upheld under the Code as presently written.

Montana Code Annotated §2-2-103(1) is a broad statement of general principles but it does not contain specific rules defining prohibited conduct that would constitute a violation of the general "public trust" and "benefit of the people" statements. Montana Code Annotated § 2-2-104, 105, 111, 112, 121 and 131 contain the specific rules describing conduct that violates the Code of Ethics. Each of these sections, unlike 2-2-103(1), begins with language declaring that the particular Code of Ethics statute is either a "rule of conduct" or that violations of the particular Code section constitute a breach of a public official's or public employee's "public duty" or "public trust" obligations.

Frasier asserts that Montana Code Annotated §2-2-103(2) supports his contention that the general statement of principles in 2-2-103(1) are enforceable rules of conduct. Section 2-2-103(2) provides that a public employee or public official is liable to the people of Montana and subject to the Code's penalties "provided in **this part** for abuse of the public's trust" (emphasis added). The reference to "this part" rather than "this section" supports the interpretation in the preceding paragraph and is consistent with the legislative history of the Code of Ethics. Moreover, subsection (3) of the statute provides:

This part sets forth various rules of conduct, the transgression of any of which is a violation of public duty, and various ethical principles, the transgression of which must be avoided.

Like subsection (2), subsection (3) of the statute clearly reflects the legislature's intent that other statutes in Title 2, chapter 2, part 1 must be examined to identify the specific standards and ethical principles that govern the conduct of state officers and employees.

Frasier's sweeping interpretation of Montana Code Annotated §2-2-103(1) must also be rejected because it would create serious constitutional questions about the Code. Simply stated, every past and current public official and public employee would be a law breaker under Frasier's interpretation if they ever dealt with any personal

matter (non-government matters) while on the job or while using equipment, office space, or supplies purchased or leased with public funds.⁴ The State of Montana has clearly chosen to regulate and prohibit certain activity by public employees and public officials under the Code of Ethics. However, the exercise of that regulatory power cannot unduly infringe on protected freedoms or be so indefinite that a person of ordinary intelligence does not have fair notice that his or her conduct is forbidden. *Montana Automobile Association v. Greely*, 193 Mont. 378, 387 & 393, 632 P.2d 300 (1981).

Public employees and public officials do not forfeit all of their constitutional rights at their place of public employment or while on the job as a government employee. The State of Montana's computer use policies authorize state employees to use state-owned computers for limited personal use. The Information Technology Service Division has established several policy statements identifying appropriate and inappropriate use of state information technology resources, including the User Responsibility Policy, No. ENT-SEC-081, the Electronic Mail Policy, No. ENT-NET-042, and the Internet Acceptable Use Policy, No. ENT-INT-011. Each document addresses a specific area of information technology, but they are designed to be complementary. For the purposes of this matter, the principal language in policy statements ENT-INT-011 and ENT-NET-042 is that information technology resources may not be used for "extensive use for private, recreational, or personal activities."

The User Responsibility Policy provides some additional guidance by stating that users of State information technology resources must recognize the importance the resource has on the effective operation of state government. That realization brings with it an obligation to use the resource in an acceptable, responsible, and ethical manner. The existence of such state computer use policies and the evidence introduced at the hearing illustrate the over-breadth of Frasier's interpretation of Montana Code Annotated §2-2-103(1).

⁴ Under Frasier's literal interpretation of 2-2-103(1), a public employee would violate the Code of Ethics if the employee placed or received a phone call using publicly-owned telephones to deal with child care problems, the scheduling of a dental appointment, medical or family emergencies, school issues, or any other personal matter not involving a public employee's official public duties.

Frasier asserts that Simonich and Charlton violated 2-2-103(1) by having another state employee work on their personal computers at their place of public employment even though the employee was providing the computer services after taking comp time for the time spent providing the services. Conversely, Frasier testified that he does not believe that his use of his state computer to purchase a vehicle or golf clubs for his personal use while at his place of public employment was a violation of 2-2-103(1). There is no statutory language in Montana Code Annotated §2-2-103(1) that would enable me to distinguish between Frasier's use of his state-owned computer for personal matters while punishing Simonich and Charlton for using state resources to correct problems on their personal computers. Other specific rules of conduct in the Ethics Code would have allowed me to find that Simonich and Charlton violated prohibitions against using public resources to benefit the public employee's personal economic interests (2-2-104), private business interests (2-2-221), or for political purposes (*id.*) if Frasier had made such allegations and presented evidence to substantiate such charges. Frasier made no such allegations in his ethics complaint and presented no evidence relating to those matters.

My interpretation of Montana Code Annotated §2-2-103(1) in the preceding paragraphs does not give me personal satisfaction. I am personally disappointed by the conduct of all parties in this matter. Despite my determination that their conduct in this matter did not violate the Code of Ethics, Simonich and Charlton should never have asked or allowed Department of Commerce employees to work on their personal computers in the Department's offices or use public resources in performing such computer services. As state government managers and leaders, Simonich and Charlton have an elevated responsibility to model ethical behaviors that represent a high level of integrity. Conduct like what was exhibited at the Department of Commerce does nothing but reinforce the public's jaded perpetuation of the myths surrounding public employees. This heightened level of scrutiny, deserved or not, should be expected by all public employees, especially public employees in positions of significant authority. Occasionally, "appropriate ethical standards" means something more than that which the Montana Legislature found to be worthy of codification.⁵ Similarly, I am

⁵ State of Montana, User Responsibility Policy, No. ENT-SEC-081, August 2, 2001.

frustrated by Frasier's inconsistent interpretation of 2-2-103 and his willingness to overlook his use of public resources for personal matters.

This opinion illustrates the need for the Montana Legislature to take a hard look at and specifically define when the use of public resources by a public servant for personal matters constitutes a violation of the Montana Code of Ethics. It is essential that a well-defined and consistent "personal use of public resources" rule be adopted under the Code of Ethics if the legislature and the public want an enforceable policy and one that accomplishes the purposes of the Ethics Code -- preventing conflicts between public duty and private interest (2-2-101), maintaining public confidence in the integrity of public servants, and ensuring that public employees and public officials carry out their duties for the benefit of the people (2-2-103).

Montana Code Annotated § 2-2-104

Frasier alleges that Charlton and Simonich gave themselves a gift in violation of Montana Code Annotated § 2-2-104(1)(b)(i) and (ii) when they asked for and received personal computer services from agency employees. This allegation cannot be sustained under the Code of Ethics for two reasons:

First, my predecessor, Commissioner Linda Vaughey, has correctly determined that the term "gift" used in 2-2-104(1) means that "something [is] voluntarily transferred by one to another without compensation" or for value that is far less than the item or service received. See Commissioner Vaughey's September 25, 2002 Decision *In the Matter of the Complaint of the Montana Democratic Party Against Judy Martz*, pp. 16 & 17. The gift giving prohibited by Montana Code Annotated § 2-2-104(1)(b)(i) and (ii) requires that someone other than the public servant who received the gift has given a gift that violates the express provisions of 2-2-104(1).

Second, Frasier did not allege and he offered no proof that Simonich and Charlton asked for or accepted the computer services provided by the Department of Commerce employees in violation of Montana Code Annotated § 2-2-104(1)(b)(i) and (ii). These Code provisions require Frasier to prove that Simonich and Charlton asked for or accepted the computer services knowing that the services were provided to

influence them "to depart from the faithful and impartial discharge of ...[their] public duties" or as a reward for official action taken. Frasier did not allege and he offered no evidence to substantiate that the employees who provided the personal computer services to Simonich and Charlton expected to be rewarded (i.e., a job promotion, salary increase, or an office with a view) or were rewarded for providing such services. Frasier's only allegation was that Simonich and Charlton gave a gift to themselves.

Montana Code Annotated § 2-2-136(1)(b)

Montana Code Annotated § 2-2-136(1)(b) states that the Commissioner may dismiss a complaint that is frivolous, does not state a potential violation of the Code of Ethics, or does not contain sufficient information to enable the Commissioner to determine whether a potential violation exists. The Commissioner's acceptance of a complaint and the scheduling of a hearing is simply a determination that the complaint is in proper form and appears to state a matter within the Commissioner's jurisdiction. Under the Ethics Code, the complainant then has the burden of proving in a contested case hearing that the violations alleged in the complaint did, in fact, occur. Frasier failed to meet his burden of proof in this matter.

IV. CONCLUSION

Based on the preceding, Frasier's December 3, 2004 complaint against Mark Simonich and Barbara Charlton is hereby dismissed with prejudice.

Montana Code Annotated § 2-2-136(2), provides that the Commissioner may assess the cost of bringing the proceeding against the person alleging a violation if the Commissioner finds that the violation did not occur. The purpose of this provision is not to dissuade individuals from filing complaints in good faith, but to reduce the likelihood of frivolous complaints being lodged for retaliatory purposes. The complaint offered an opportunity to clarify the scope of the Code of Ethics and address, for the first time, an alleged violation of Montana Code Annotated §2-2-103(1). Therefore, the costs of this proceeding will not be assessed against the complainant.

Dated this _____ day of May, 2005.

Gordon Higgins
Commissioner

NOTICE: This is a final decision in a contested case. The parties have the right to seek judicial review of this decision pursuant to the provisions of Montana Code Annotated §§ 2-4-701 through 2-4-711.